REPORTABLE

IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Case No : 50 / 98

In the matter between **:**

ZWELAKE NGCOBO **First Appellant**
BUKIWE NGCONGO
Second Appellant
JOSEPHINA ZUNGU
Third Appellant
NOMZINTO MTHEMBU
Fourth Appellant

and

SALIMBA CC
Respondent

Case No : 631 / 97

And in the matter between **:**

FIKILE NGCOBO **Appellant**
and
B.W.J. VAN RENSBURG **Respondent**

Composition of the Court : **Mahomed CJ; Grosskopf and Olivier JJA; Farlam and Madlanga AJJA**

Date of hearing : **16 March 1999**

Date of judgment : **26 March 1999**

Labour tenant - eviction - interpretation of definition of labour tenant in the Land Reform (Labour Tenants) Act, 3 of 1996

JUDGMENT

OLIVIER JA :

[1] The two appeals before us require an interpretation of the definition of "labour tenant" as the term is used in the Land Reform (Labour Tenants) Act 3 of 1996 ("the Act"). The appeals were heard on the same day, deal with some common issues, and are conveniently decided in one judgment. For the sake of clarity they will be referred to as the Salimba and the Van Rensburg appeal respectively. Central to both appeals is the interpretation of sec 1 of the Act.

[2] Sec 1 of the Act provides :

> In this section "labour tenant" means a person
>
> (a) who is residing or has the right to reside on a farm;
>
> (b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
>
> (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,
>
> including a person who has been appointed as a successor to a labour tenant in accordance with the provisions of section 3 (4) and (5), but excluding a farmworker.

A "farmworker" is defined as

a person who is employed on a farm in terms of a contract of employment which provides that -

(a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and

(b) he or she is obliged to perform his or her services personally.

"Owner" is defined with reference to sec 102 of the Deeds Registries Act 47 of 1937, with the addendum ...and where it occurs in the definition of 'labour tenant' includes his or her successors and predecessors in title.

[3] The Salimba appeal

At the end of a trial in the court *a quo*, Hurt J found that the Respondent (Salimba) was the owner of a farm known as Rose Cottage in the Byrne area in KwaZulu-Natal; that the Appellants and members of their families, though occupiers of the land, were not labour tenants in terms of the Act. The learned judge consequently granted an order ejecting them from the land in question. The appeal is before us with leave of the court *a quo*.

The land under discussion has been owned since 1936 by various owners. Salimba became the owner in 1994. The Appellants claim that they and their family predecessors were, at all times relevant to this action, residing in the farm and rendering certain duties to the owners in consideration of their

being allowed to cultivate lands and pasture stock for their own benefit.

Salimba instituted action in the Natal High Court for an order ejecting the Appellants. Following *Graham v Ridley* 1931 TPD 476 and *Chetty v Naidoo* 1974 (3) SA 13 (A) it merely alleged that it was the owner of the land and that the Appellants were occupying the land.

However, sec 5 of the Act clearly states that, subject to certain exceptions, a labour tenant or his or her associate may be evicted only in terms of an order of the Land Claims Court ("the LCC") issued under the Act. The effect of this provision is that if a person is a "labour tenant" in terms of the Act, the High Court has no jurisdiction to eject him or her from the property in respect of which tenancy is claimed. The issue before the court *a quo* and now this Court is whether the Appellants are "labour tenants" in terms of the Act - a question of interpretation properly within the jurisdiction of the High Court and also of this Court. If the High Court correctly found that the Appellants were not labour tenants then it could grant an ejection order, there being no other ground upon which they claimed a right to occupy. If, on the other hand, the court *a quo* had correctly found that the Appellants were labour tenants, then not it but only the LCC could adjudicate upon a claim for ejectment.

The issue, then, is simply whether, on the facts found by the court *a quo* and the correct interpretation of the Act, Hurt J was right in holding that the Appellants were not labour tenants and thus ordering their ejectment.

[4] It was common cause in the court *a quo* that the **second** and the **fourth** Appellants had not brought themselves within the ambit of requirement (c) of the definition of labour tenant in the Act, because neither of them had tendered any evidence to the effect that their parents or grandparents had rendered services in return for rights of occupation and use of the portion of the farms on which they worked. If the definition requires a person to bring herself or himself within all three paragraphs of the definition, *i.e.* (a), (b) and (c), the

second and fourth Appellants have no defence to the action for ejectment brought against them by Salimba.

The crux of the legal issue in respect of these two Appellants, therefore, is this : should paragraphs (a), (b) and (c) of the definition be read conjunctively (or, what amounts to the same, cumulatively) or, what was termed by counsel disjunctively, so that compliance with paragraphs (a) and (b) would suffice. Hurt J found in favour of the conjunctive interpretation.

[5] In respect of the **first** and **third** Appellants two other issues arose: firstly, whether the "owner" of the farm as defined, where the Appellant's parent or grandparent lived and provided tenant labour, or a successor of that owner, must be the owner also of the farm on which the Appellant lives and provides labour. Secondly, on whom the *onus* rests to prove that the alleged labour tenant was not a farmworker. On both issues Hurt J found against the Appellants.

In the result, Hurt J also ordered these Appellants to vacate the land occupied by them.

[6] <u>The Van Rensburg appeal</u>

The Appellant and another applicant applied in the LCC for an interdict preventing the Deputy Sheriff for the magisterial district of Babanango from

executing a warrant for their ejectment from the land occupied by them, issued

at the instance of the owner, Mr van Rensburg. The application was refused on the basis that the Applicants were not labour tenants as defined in the Act.

At the trial it was found by Dodson J, delivering the judgment of the LCC, that neither of the applicants had complied with paragraph (b) of the definition, because they had never worked or provided labour to Mr van Rensburg or his predecessors in title. The application was refused.

This factual finding was not attacked on appeal before us. The legal dispute is in essence similar to the one in respect of the second and fourth Appellants in the Salimba appeal : should paragraphs (a), (b) and (c) of the definition be read conjunctively, to the detriment of the Appellant, or disjunctively, in which case compliance with only paragraphs (a) and (c) would still be sufficient for the appeal to be upheld.

[7] On behalf of the Appellants it was argued in both courts *a quo* that, on a proper interpretation of the Act, a person qualifies as a "labour tenant" if he or she satisfies paragraphs (a) and <u>either</u> (b) <u>or</u> (c). It was argued that paragraphs (a), (b) and (c) of the definition fall to be read disjunctively for the following

reasons : -

The intention of the legislature could not have been that the three paragraphs be read conjunctively, because such a reading would in substantial measure stultify the object of the Act and lead to injustice. The object of the Act is to protect those who traditionally rendered labour in exchange for the right to occupy and use land from eviction at the whim of the owner of the land subject only to compliance with the common law requirement of reasonable notice. If a 70 year old person claims to be a labour tenant on a farm where she or he was born and has lived all her or his life and to have satisfied the requirements of paragraph (b), the legislature could not have intended that the enquiry be extended to determine what such a person's parents' occupations had been or where they had lived. In practice this would more often than not be impossible to determine or check or verify.

It was argued that the widest possible meaning should be given to the

concept of a labour tenant to ensure that as many as possible of the victims of this form of racial discrimination are protected. In order to achieve this a disjunctive reading of the definition is called for, because a conjunctive 7
interpretation would not give effect to this intention and in fact would result in unfair consequences, for example :

(i) The so-called first generation labour tenant is afforded no protection,

notwithstanding the fact that such a person may have been a labour tenant for many years, perhaps all his working life, whereas the second generation labour tenant is protected, notwithstanding the fact that he and his parent combined may not have been labour tenants for long at all.

(ii) The situation described by Meskin J in his judgment in the *Tselentis*

Mining (Pty) Ltd and Another v Mdlalose and Others 1998 (1) SA 411 (N) case at 418 H - 419 B, could arise :

> A person (A) who qualifies as a labour tenant as at 2 June 1995 in terms of paragraphs (a) and (b) of the definition of "labour tenant" has a son (B). A person (C) who qualifies as a labour tenant as at 2 June 1995 in terms of paragraphs (a) and (b) of the definition of "labour tenant" has a son (D). As at 2 June 1995 each of B and D resided or had a right to reside on the relevant farm, but neither B nor D had the rights envisaged by paragraph (b) of the definition. A is alive as at 22 March 1996, the date of commencement of the Act. A can ensure that B has the benefits of the occupation and use of the relevant part of the farm and the concomitant rights by appointing B as his successor (section 3 (3) (b)) or, if A dies without appointing a successor, A's family can appoint B as A's successor (section 3(4)). C has died before 22 March 1996. There is no way in which (absent paragraph (c) of the definition of "labour tenant") D can acquire the relevant benefits notwithstanding that C, his father, enjoyed such

benefits. This is manifestly unfair to D, who is prejudiced, as against B, by the mere accident that C has died before 22 March 1996, whereas A is alive as at such date. The legislature can hardly have intended such prejudice to exist. Certainly no reason for such discrimination as between B and D occurs to me or, in my opinion, appears from the Act.

These injustices outweigh the suggested anomalies resulting from the disjunctive approach.

Professor J.M. Pienaar in an article entitled "*Labour tenancy : recent developments in case law*" in volume 9, no 3 *Stellenbosch Law Review*, 1998 at 311 *et seq.* argued that a person could qualify as a labour tenant for purposes of the Act if his or her grandparent or parent provided labour against the right to grazing while residing on the farm. Persons could therefore qualify as labour tenants in terms of paragraphs (a) and (b) when the actual physical use and occupation of the farm was through parents or grandparents, although the right to reside on the farm and the rights of cropping and grazing were in fact vested in the person establishing labour tenancy (see p 321).

As regards the meaning of paragraph (c) Professor Pienaar relies on the following *dictum* of Meskin J in the *Tselentis*-case, *supra*, at 418 F-G:

> The intention of the Legislature is not ... to make it a *sine qua non* of qualification as a labour tenant that as at 2 June 1995 one's parent or grandparent had these rights in addition to *the fact that one oneself had such rights as at such date*; the intention was to create an *additional means* by which a person who as at 2 June 1995 resided or had the right to reside on the farm but who did not have in his own right the rights to use cropping or grazing on such farm can nevertheless qualify as a labour tenant if his parent or grandparent in the latter's own right had such rights. One can readily understand why the Legislature has made such provision.

It was finally submitted on behalf of the Appellants that the decisions in *Tselentis Mining (Pty) Ltd and Another v Mdlalose & Others* , *supra*, at 420 G - H and *Klopper and Others v Mkhize and Others* 1998 (1) SA 406 (NPD) at 408 are to be preferred to the decisions of *Mahlangu v De Jager* 1996 (3) SA 235 (LCC) and *Zulu and Others v Van Rensburg and Others* 1996 (4) SA 1236 (LCC) and *Ngcobo and Another v Van Rensburg and Others* 1997 (4) All SA 537 (LCC).

[8] The Respondents relied on the following arguments as support for their contention that paragraphs (a), (b) and (c) should be read conjunctively.

They supported the analysis by Dodson J in the court *a quo* in the Van Rensburg case, reported as *Ngcobo and Another v van Rensburg and Others*, *supra*, at 541 c - h :

. There can be no quarrel with the suggestion that the definition must be read in its context and with due regard to the objects of the Act. However, there are flaws in Mr Rall's argument. The interpretation of the definition for which he contends does not require a simple disjunctive reading of the word 'and' between paragraphs (b) and (c). A simple disjunctive reading would give 'and' the meaning 'or'. This the courts will quite readily do if the proper application of the rules of statutory interpretation justify it. Hence the following extract from the judgment of Dowling J in *R v La Joyce (Pty) Ltd and another*:

> The authorities .. show that the Courts are not so slow to read 'and' for 'or' or 'or' for 'and' in cases where such a course appears better to give effect to the obvious intention of the Legislature and the scheme of the Act.

But this is not what we are asked by counsel for the appellants to find. Rather, the meaning which he seeks to attribute to the word 'and' requires a significant

modification of the definition, so that a labour tenant would in fact be a person -

(a) who is residing or has the right to reside on a farm; *and either*

(b) **[who]** has or has had the right to use cropping or grazing land on the farm referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; **[and]** *or*

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm,

including a person who has been appointed a successor to a labour tenant in accordance with the provisions of s 3(4) and (5), but excluding a farm worker.

Thus one must read in the word 'and either' at the end of paragraph (a), delete the word 'who' in paragraph (b) and read 'or' for 'and' at the end of paragraph (b).

The word 'and' at the end of paragraph (b) would in its ordinary grammatical sense only indicate that paragraph (c) contains an additional requirement to be complied with. If regard is had to the context of the word "and" at the end of paragraph (b) of the definition, it is clear that the word was intended to be used in its usual conjunctive or cumulative sense. By doing so the result would not be unreasonable, inconsistent or unjust.

The Act is intended to protect a very particular class of rural tenant and in determining that class of tenant paragraphs (b) and (c) must also be complied with. *Zulu and Others v van Rensburg and Others*, *supra*, page 1254 C - E.

To conclude as Galgut J did in *Klopper and Others v Mkhize and Others*, *supra*, that :

> It may well have been intended that paragraph (a) and (b) must read conjunctively, but it seems ... that the further intention was that paragraph (c) must either be read on its own or conjunctively with paragraph (a) only ...

could lead to absurd results. If paragraph (c) is read on its own then a person living in the city who does not reside on a particular farm and never did and has no right to reside on that particular farm, but whose grandparents at the turn of the century happened to have resided on a particular farm and had the use of cropping or grazing land on not even that farm but another farm owned by the same owner and in consideration provided labour to the owner or lessee, would qualify as a labour tenant and have rights in terms of the Act. The legislature could hardly have intended such a result.

If paragraph (c) of the definition is to be read conjunctively with paragraph (a) only, then the qualification contained in paragraph (b) would be ignored, which is also an untenable interpretation as it ignores the express wording of paragraph (b).

In interpreting the definition of "labour tenant" it is important to bear in mind that although a purposive approach might be appropriate, a finding that a person qualifies as a "labour tenant" detracts from the registered owner's real rights in and to his property which

(i) he enjoys at common law;

(ii) are guaranteed in terms of Section 25 of the Constitution Act No 108 of 1996.

In the final analysis, a bald statement that a conjunctive reading of the requirements would "in substantial measure stultify the object of the Act and

lead to injustice" (Appellants' words) is of no assistance as it must be kept in mind that the Act seeks to strike a balance between labour tenants and owners. In the words of Hurt J in the court *a quo* in the Salimba appeal :

> The important feature of the Act insofar as the disputes in this action are concerned, is that it affects and regulates the rights of 'labour tenants' (who may fairly be called the 'beneficiaries' of its provisions) on the one hand and owners of the property to which the 'labour tenants' lay claim (whether in the form of rights of use and occupation or as aspirant owners) on the other.

Finally it could not have been the intention of the legislature that the provisions of paragraph (b) should be excluded. The providing of labour by the person who seeks to be declared a labour tenant or who alleges that he is a labour tenant is a necessary ingredient of the concept of labour tenancy. It is unthinkable that the legislature had in mind to declare a person a labour tenant if he himself had not provided any labour as is required by paragraph (b) of the definition and only his father or grandfather had done so as referred to in paragraph (c) of the definition.

[9] As far as the decisions of the High Court and the LCC are concerned, only those of Galgut J in *Klopper and Others v Mkhize and Others*, *supra*, and of Meskin J in *Tselentis Mining (Pty) Ltd and Another v Mdlalose and Others*, *supra*, for the reasons mentioned above, support the view advanced by the Appellants.

[10] On the other hand, there are a number of decisions that firmly favour the view taken by the Respondents. I mention them and the main reasons advanced in the judgments.

In the case of *P.A. Jacobz N.O. and Others v G. Mbongwa and Others*, an unreported decision in Case No 3700/95 in the High Court of South Africa, Natal Provincial Division, delivered on 29 March 1996, Thirion J said the following :

> To my mind it is clear that in the definition of labour tenant paragraphs (a), (b) and (c) should be read conjunctively. That much I think becomes clear from a reading of the recital of the objects of the Act. There is also a recital of the history of discriminatory laws and practices which are said to have led to the systematic breach of human rights and the denial of access to land. It is clear that the Act sets about to deal with an historical situation - a situation which has been of long standing in this province, where farmers used to permit labourers to reside on their farms and graze cattle and plant crops on a piece of land set aside for that purpose - all this in return for their providing labour for the farmer. I have come to a conclusion therefore that the definition of labour tenant embraces all three paragraphs (a), (b) and (c).

In *Mahlangu v de Jager*, *supra*, a full bench decision, Gildenhuys J delivering the judgment, rejected the argument that only paragraph (a) needs to be complied with. He stated (at 242 B) that if that were the case, it is difficult to understand why paragraphs (b) and (c) were included in the definition.

In *Zulu and Others v Van Rensburg and Others*, *supra*, Dodson J firmly rejected the disjunctive approach and said the following at 1253 H - 1254 E :

> This Court held in the matter of *Mahlangu v de Jager* that the

> definition requires that, in order to qualify as a labour tenant, there must be compliance cumulatively with paragraphs (a), (b) and (c) of the definition. It is indeed so that the word and can in certain circumstances be read disjunctively ..... If regard is had to the context of the word and at the end of paragraph (b) of the definition, it is plain that the word was intended to be used in its usual conjunctive or cumulative sense. To hold otherwise would give rise to absurd results. For example, an ordinary tenant could show that he or she resided on a farm and did not qualify as a farmworker. This would, on a disjunctive interpretation, qualify all ordinary lessees of farmland who reside on the farm as labour tenants. Moreover the implications of sec 6 of the Act would be that they would also have an option to purchase the farmland. Plainly this was never intended by the Legislature. The Act is intended to protect a very particular class of rural tenant and in isolating that class of tenant paragraphs (b) and (c) must come into play.

In the court a quo in Salimba's case, Hurt J in a well-reasoned judgment held that paragraphs (a), (b) and (c) of the definition of labour tenant should be read conjunctively. He stated the following :

> The interpretation arrived at in the *Tselentis* case postulates that a person who satisfies requirements (a) and (c) will fall within the definition of a 'labour tenant'. The result would be that any person, other than a farm worker, as defined, who has the right to reside on a farm and whose grandparent satisfied the requirements in paragraph (c) would fall within the ambit of the definition. For reasons which I will state later, I consider that the words 'a farm' in paragraph (c) must be given a restrictive interpretation, but even if this is not done the consequences of an interpretation which requires only elements (a) and (c) to be met for a person to qualify as a 'labour tenant' provide a broad spectrum of absurdity. It would result in people who do not fall within what the preamble to the Act refers to as 'the present institution of labour tenancy in South Africa' being given the statutory protection and benefits conferred by the Act upon 'labour tenants'. In deciding whether such a result is absurd, one does not look only at the position of the 'labour tenant' but also at the position of the 'owner' who is, obviously, the 'other party' affected by the provisions of the Act. The Act stated the legislator's general intention fairly clearly in the preamble. I do not think that it can, by the

> furthest stretch of imagination, be said that the Act was intended to benefit a class of people who do not fall within the ambit of element (b) of the definition but whose grandparents were 'labour tenants' within the meaning of that term as used before the advent of the Act. It follows that I am of the view that the so-called disjunctive interpretation is not in accordance with the intention of the legislator and I consider that a person cannot be treated as a 'labour tenant' unless he satisfies all three elements of the definition and is not a 'farmworker' as defined.

The learned Judge dealt with the conflicting decisions in *Klopper and Others v Mkhize and Others*, *supra* and *Tselentis Mining (Pty) Limited and Another v Mdlalose and Others*, *supra*, and came to the conclusion that they were based on a wrong interpretation of the definition of labour tenant.

In the judgment of the court *a quo* in the Van Rensburg appeal, reported as *Ngcobo and Another v Van Rensburg and Others* to which I have previously referred, Dodson J, in a particularly lucid and helpful judgment, pointed out, as mentioned above, that what the Appellants contend for was not a simple disjunctive reading (see paragraph [7] above). But Dodson J also dealt with the anomalies that would result from a conjunctive reading of paragraphs (a), (b) and (c), to which I have already referred. Apart from technical responses to the anomaly relied on by Meskin J in the *Tselentis*-case (as to which, see 543 b - g of the *Van Rensburg* judgment), Dodson J, conceding the harshness in some cases where the conjunctive approach is applied, stated (at 543 g - h) that the introduction of legislation which confers new rights will always result in unfortunate cases where qualifying criteria are not met by certain persons because of events which preceded the coming into force of the new legislation. Such cases, the learned judge remarked (at 543 h), cannot afford a basis for the adoption of an interpretation which amounts to a modification of the legislation. He also stated that the anomaly contemplated by Meskin J (if it is one - see paragraph [7] above) is outweighed by the anomalies which arise on the disjunctive interpretation. Dodson J was also of the opinion that the conjunctive approach cannot be said to give rise to anything as extreme as absurdity. It requires no modification of the definition, nor even the adoption of any secondary or unusual meaning for any of the words in the definition (at 542 e - f).

However Dodson J (at 544 paragraphs [20] and [21]) proceeded to

point out that absurd results do flow from a disjunctive interpretation of the definition.

> What are the anomalies which arise on the disjunctive interpretation? Take the example of a person who, on 2 June 1995, was and continues to be, a farm worker who provides her services personally and is paid predominantly by way of a cash salary but in part by way of rights to live on the farm and graze a few cows or keep a vegetable patch. Such a person is clearly not intended to qualify (no matter what her ancestry may be) because farm workers are expressly excluded from the definition of a labour tenant. However the farm worker has children who are allowed to live with her and have done so since at least 2 June 1995. Those children would then qualify as labour tenants in their own right because they comply with paragraphs (a) and (c). Those children would then have the significant rights afforded labour tenants under the Act, including the right to have family members living with them. Family members would by definition include their farm worker parent. That parent would then be able to derive most of the benefits which she was excluded from by reason of her farm worker status because she is a family member of her children. If she were dismissed, eviction from the farm could be avoided by ensuring as guardian of the children that they exercised their right under section 16 to acquire the portion of the farm where they lived. This is an absurd situation which could never have been intended.
>
> The situation is all the more absurd if one considers that the farm referred to in paragraph (c) of the definition need not be the same as the farm referred to in paragraph (a). Thus in the example referred to above, the children would, on the disjunctive interpretation, still have the rights of a labour tenant in relation to the farm where they resided even if their parent is or was employed as a farm worker on similar terms by a different farmer on a different farm. There are other anomalies which are conceivable on the disjunctive interpretation, but in my view those already mentioned are sufficient to illustrate the point.

Finally, Dodson J rejected the solution offered by Meskin J in the

Tselentis - case (and by Professor Pienaar in the article mentioned above), *viz* that in satisfaction of paragraph (b) of the definition the labour can be provided by the tenant's parent or grandparent. He held that sec 3 (1) cannot be used to redefine paragraphs (a), (b) and (c) of the definition (at 546, paragraph [24]), and held that the suggested interpretation of Meskin J could not possibly have been intended as an acceptable interpretation of the Act (at 546, paragraph [25]).

In *Van Niekerk v Nqonwange*, an unreported judgment delivered on 19 August 1997 in the Transvaal High Court under case number 24921/96 (mentioned by Dodson J in the *Van Rensburg* - case at 547 footnote 29), Du Plessis J differed from the judgment of Galgut J in *Klopper and Others v Mkhize and Others*, and held that paragraph (c) cannot be read on its own (see the quotation from this case by Dodson J in *Van Rensburg* at 547, paragraph [26]).

Finally, the Respondents' interpretation was held to be the correct one in *Mosehla v Sancor cc* 1999 (1) SA 614 (T) in a decision of the full bench of the Transvaal Provincial Division (Van Dijkhorst and De Villiers JJ), Van Dijkhorst J delivering the judgment. The learned judge firmly favoured the conjunctive interpretation, rejected the views expressed in *Klopper* and *Tselentis Mining*, and agreed with the decisions of the LCC in *Mahlangu v De Jager* and *Zulu and Others v Van Rensburg and Others*. As regards the judgments of Galgut J and Meskin J, he remarked (at 620 H - 621 A) , after referring to the object of the

Act :

> Whereas it may be perceived as unfair that a family which has for decades occupied premises on a farm be evicted, there could be no injustice should a worker who on 31 May 1995 joined the corps of employees on the basis that his remuneration would be predominantly his use of land, be discharged for thieving one month later and evicted from the farm. The Legislature could not have intended to grant such employees security of tenure. Yet this is the consequence of the two Natal judgments. This result is absurd.

[11] In my view, the conjunctive or cumulative interpretation of paragraphs (a),

(b) and (c) of the definition now under discussion is clearly the correct one.

It is unfortunately true that the words "and" and "or" are sometimes inaccurately used by the legislature, and there are many cases in which one of them has been held to be the equivalent of the other (see the remarks of Innes CJ in *Barlin v Licensing Court for the Cape* 1924 A D at 478). Although much depends on the context and the subject matter (*Barlin* at 478), it seems to me that there must be compelling reasons why the words used by the legislature should be replaced; *in casu* why "and" should be read to mean "or", or *vice versa*. The words should be given their ordinary meaning " ... unless the context shows or furnishes very strong grounds for presuming that the legislature really intended" that the word not used is the correct one (see Wessels J in *Gorman v Knight Central GM Co Ltd* 1911 TPD 597 at 610; my underlining). Such grounds will include that if we give "and" or "or" their

natural meaning, the interpretation of the section under discussion will be unreasonable, inconsistent or unjust (see *Gorman* at 611) or that the result will be absurd (*Greyling and Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others*, 1982 (4) SA 427 (A) at 444 C-D) or, I would add, unconstitutional or contrary to the spirit, purport and objects of the Bill of Rights (sec 39 (2) of the 1996 Constitution.) In this respect I draw attention to what was said by Mahomed AJ in *S v Acheson*, 1991 (2) SA 805 (NmHC) at 813 A - B :

> The constitution of a nation is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and tenor of the constitution must therefore preside and permeate the processes of judicial interpretation and judicial discretion.

In my view, none of these grounds is applicable when paragraphs (a), (b) and (c) of the definition are given their ordinary grammatical meaning, in particular when "and" at the end of paragraph (b) is read to mean "and". As pointed out above, there are possible anomalies created by such interpretation (see especially the examples developed by Meskin J in the *Tselentis*-case). Some or all of these postulated anomalies may even result in unjust consequences. On the other hand, there are also anomalies and unjust and even

absurd consequences flowing from the disjunctive approach, as pointed out by Dodson J in *Zulu and Others v Van Rensburg and Others*, *supra*, at 1253 H - 1254 E; again by Dodson J in *Ngcobo and Another v Van Rensburg and Others*, *supra*, at 544 paragraphs [20] and [21] and Van Dijkhorst J in *Mosehla v Sancor cc*, *supra*, at 620 H - 621 A. I have hereinbefore fully quoted the remarks of these judges in the relevant cases and do not intend to dwell upon them in further detail. Suffice it to say that I agree with the judgments that adopted the so-called conjunctive approach, and reject the judgments in *Klopper and Others v Mkhize and Others*, *supra*, and *Tselentis Mining (Pty) Ltd and Another v Mdlalose and Others*, *supra*, as regards this aspect of the case.

[12] The result of this finding is that the appeal of the **second** and **fourth** Appellants in the Salimba appeal must fail as the Appellants have not brought themselves within the ambit of paragraph (c) of the definition. Likewise the appeal of the Appellant in the Van Rensburg appeal fails as the Appellant has failed to prove compliance with paragraph (b) of the definition.

[13] I have not come to this conclusion without a sense of sympathy for these Appellants. They had to come to this Court at great expense simply because of the bad and slovenly draftsmanship of the Act. They may have believed their cause just and their case to have merit. They and many other occupiers of land may be severely prejudiced by the anomalies and absurdities pointed out in the cases to which I have referred. The legislature may wish to address these anomalies.

It is important to keep in mind that the Act was intended to reform the legal relationship that had prevailed between the owner of a farm and labour tenants since the apartheid era. Under that regime, the ‘rights’ of those who served an owner in return for the privilege of working and grazing pieces of

land for their own benefit were as illusory as they were precarious. These labour tenants occupied the land at the whim of the landowner, who could eject them subject only to compliance with the common-law requirement of reasonable notice. In our country, land ownership was effectively beyond the reach of the majority of black people - people who were, because of the apartheid system and its concomitant discriminatory education system, kept in ignorance even of their rudimentary rights. Rural people had little choice but to become either farmworkers, with no prospect of building up even a minuscule estate, or tenant labourers, with no legal protection of their tenancy. The last group was thus reduced to feudal dependency : they had either to comply with the orders of the land owner, even if harsh and unjust, or face the prospect of nomadic trekking and seeking, in an unsympathetic environment, new land to occupy.

One of the main objects of the Act is to give labour tenants greater security. The preamble of the Act reads as follows :

> To provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith.
>
> WHEREAS the present institution of labour tenancy in South Africa is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land;
>
> WHEREAS it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms;
>
> WHEREAS it is desirable to institute measures to assist labour tenants to obtain

security of tenure and ownership of land;

AND WHEREAS it is desirable to ensure that labour tenants are not further prejudiced.

Meticulous and unambiguous craftsmanship when it comes to spelling out the rights and duties of those to whom the legislation is applicable is the first principle of legislative drafting. A draftsperson should give careful consideration to the policy it is intended to enshrine in legislation and then formulate appropriate enactments, not in vague or polyphonous terms, but in exact terms, having in mind the consequences of what is intended to be said. I am not convinced that the draftsperson has properly thought through all the situations that can and will arise as a consequence of the wording of the definition of "labour tenant" in the Act. The sheer number of cases that have come before the Courts since the Act was put on the statute book as recently as 1996 speaks for itself and must be a cause for grave concern.

[14] This brings me to the appeals of the **first** and **third** Appellants in the Salimba appeal. As indicated above, two issues have to be decided : firstly, whether the owner (or his successors) of the farm on which the Appellant's parent or grandparent lived and provided tenant labour must be the same as the owner of the farm on which the Appellant was now living and providing tenant

labour; and, secondly, on whom the *onus* rests to prove that the alleged labour tenant was not a farmworker. On both issues Hurt J found against the Appellants and found that they failed to acquit themselves thereof. 23

It is clear that in order to succeed in their appeal the said Appellants have to be successful on both issues.

[15] Must the owner (or his successors) of the farm on which the Appellant's parent or grandparent lived and provided tenant labour be the same as the owner of the farm on which the Appellant was now living and providing tenant labour? On the evidence, it is clear that the first Appellant's parents were labour tenants on the farm Kamby. He lived there with his parents, but when he married he became a labour tenant on the farm now under discussion, viz. Rose Cottage. There is no evidence that any of the owners of Rose Cottage owned Kamby. His parents, therefore, were labour tenants on a farm owned by an owner other than the owner of, the farm from which the first Appellant's eviction is being sought. A similar problem arose in respect of the third Appellant's case.

[16] On behalf of said Appellants it was contended that paragraph (c) is cast in wide terms, and only requires that the parents or grandparents of the present defendant were or had been tenant labourers on a farm, owned by an owner irrespective of whether such owner (or his successors) is also the owner of the farm on which the present occupier is a labour tenant.

The contention was claimed to be supported by the consideration that whereas paragraph (b) specifically refers to the farm "in paragraph (a)",

requiring an applicant applying in terms of paragraph (b) to satisfy requirements of paragraph (a), paragraph (c) refers only to "a" farm. Had the legislature intended the farm in paragraph (c) to be associated with that in paragraph (a) it would have said so as it did in paragraph (b).

It was also submitted that Dodson J in the LCC in the case of *Zulu and Others v van Rensburg*, *supra*, at page 1257 F correctly stated the position as follows :

> One of the objects of the act is to provide labour tenants with certain protection against eviction. In the past the common law left labour tenants exposed to eviction at the whim of the owner of the land subject only to compliance with the common law requirement of reasonable notice. Such a basis for eviction is now excluded by the act if a person can show that he or she qualifies as a labour tenant under the legislation. If we are to adopt Mr Roberts' interpretation, a person whose predecessors had over the generations consistently been labour tenants (as that term was understood before the statutory definition was enacted), but had been forced by evictions to move from farm to farm, would be excluded, whilst a person whose father and who himself or herself had been fortunate enough to avoid eviction would qualify. What then in effect becomes a disqualifying criterion is the fact of past evictions, the very problem which the act sought to deal with. A statute is presumed not to give rise to harsh or discriminatory result.

It was finally submitted that there is no justification in narrowing the interpretation of the definition to require the existence of a historical relationship between the labour tenant's family and a particular owner and his or her successor in title.

[17] The Respondent took the opposite approach :

If paragraph (c) would be satisfied if the parent or grandparent of the labour tenant resided on <u>any</u> other farm ("a farm")where they had the use of cropping or grazing land, then the words "or another farm of the owner" in the paragraph would be superfluous, because ownership of the farm in question would be irrelevant. This is contrary to the accepted canon of interpretation that every word or phrase must be given a meaning.

In order for paragraph (c) to be satisfied, it was submitted, the parents or grandparents of the person claiming to be a labour tenant residing on a particular farm must also have resided on that particular farm and had the use of cropping or grazing land on that same farm or "another farm of the owner" of such farm i.e. there must be common ownership of the farm on which the labour tenant now resides and the farm where his parent or grandparent resided (coupled with the fact that in consideration of such right a parent or grandparent had to provide labour to the owner or lessee of such or such other farm). The reference to "such farm or another farm of the owner" clearly could only refer to "such farm" of the owner or "another farm of the owner".

[18] The court *a quo* upheld the Respondent's submission on this aspect, Hurt J holding that the words "a farm" in paragraph (c) were not intended by the legislature to bear the wide meaning of " ... any farm, wheresoever situated and owned by whomsoever." The learned Judge stated :

> Such a wide interpretation would mean that one of requirements for qualification as a 'labour tenant' is, simply, that the claimant must have a grandparent or a parent who was once a labour tenant under the old system. It must be borne in mind that the Act is intended to entrench rights of occupation of property and confer rights of acquisition of property to protect people who had, for practical purposes, been bound to that property or its owner by the bonds of the feudal tenant system over an appreciable period. It is clear that, in enacting the requirement in paragraph (c) of the definition (referred to in the *<u>Ngcobo</u>*-case as 'a second generational requirement'), the legislator was narrowing down the class of people who would qualify for benefits under the Act to those whose history of 'labour tenancy' stretched back more than a

generation. As I have already indicated, I think that it is fundamental to a proper construction of the definition to bear in mind that the Statute was intended to regulate the dealings as between 'labour tenant and 'owner'. Requirement (c) refers in general terms to 'a farm' but it also refers to 'the owner'. It is not without significance that the Statute defines 'owner' with specific reference to the occurrence of that word in the definition of 'labour tenant'. The definition of 'owner' is as follows : -

> 'Owner' means the owner as defined in section 102 of the Deeds Registries Act 1937 (Act 47 of 1937), of a farm, and where it occurs in the definition of 'labour tenant' includes his or her successors and predecessors in title.

It seems to me that the existence of a historical relationship between the labour tenant's family and 'the owner' (who will include all of the present owner's predecessors in title) was what was contemplated in requirement (c) and that this paragraph should properly be so interpreted. Thus, in those cases where families established themselves on a portion of a farm and that farm was then subdivided and sold with the result that a grandchild was in occupation of a portion of one subdivision and the grandparent in occupation of a portion of another, requirement (c) would be satisfied, because the original owner of the undivided farm would be included within the term 'owner' as used in requirement (c). Conversely, this interpretation avoids the anomaly which would result from the wide interpretation of 'a farm' without reference to the identity of the owner where, for instance, a person who has satisfied (a) and (b) for a matter of months on the farm of X would be able to claim the benefits of the Act as against X on the ground that, many years ago, his grandparent had been a labour tenant (in the old sense) on a farm belonging to Y.

[19] Hurt J, however, quite fairly also highlighted the other side of the argument :

> There is a significant change in language between paragraph (b) and paragraph (c) of the definition of 'labour tenant'. When paragraph (b) speaks of the farm on which the 'labour tenant' has rights of use, it speaks of 'the farm', referred to in paragraph (a). Paragraph (c) contains no such explicit reference to the farm contemplated in paragraph (a). A significant change of language such as this does, of course, give a clear indication that the legislator did not intend that the farm on which the parent or grandparent resided or resides should be the farm referred to in paragraph (a) of the definition and there are clear reasons why this should not be so. In many instances in the old labour tenant system, when a farmer sold a farm and moved to a new one, the labour tenants on that farm moved with him. Moreover, until the advent of statutory limitations on the subdivision of agricultural land, there were many instances where farms were subdivided and subdivisions were sold while the labour tenants remained in occupation and continued to render services to the new owner of the subdivision on which they were dwelling. Equally, as time passed and the children of labour tenants grew to maturity, the farmer might have required the children to take up residence and render services on a different farm to that on which the parents or grandparents were residing. In such situations it would, in my view, be inconsistent with the purpose of the legislator to construe paragraph (c) in such a manner as to require the parent or grandparent to reside, or to have resided, on the same farm as that in respect of which the progeny claim rights.

[20] I respectfully disagree with the decision of Hurt J in the court *a quo* that the

rights under discussion should have been exercised by the present tenant and his or her parent or grandparent on a farm or farms belonging to the same owner or his or her predecessors or successors.

I am of the view that the change from "the" farm to "a" farm in the definition cannot be ignored, *i.e.* that "a" cannot simply be replaced by "the". The same reasoning which I have applied earlier in this judgment in respect of

"and" and "or" would seem to me to be applicable.

I am not convinced that Hurt J in the court *a quo* was correct in saying that the Act was intended to protect only those who had been bound to a property of the same owner (or his predecessors or successors) by the bonds of a feudal labour tenant system over an appreciable period, nor in saying that it was intended to narrow down the class of persons who would qualify for benefits under the Act. 28

I believe on the contrary, that the view taken by Dodson J in ***Zulu and Others v Van Rensburg***, *supra*, and the contentions there advanced by him (see the quotation in paragraph [10] hereinbefore) are correct (see also on this point Meskin J in the ***Tselentis*** - case at 419 J - 420 B for the correct perspective). The object of the Act was to give a wide and equitable protection to labour tenants without ignoring the rights of the owners of farms. This balance can be achieved more justly and equitably by adhering to the text of paragraph (c) of the definition, rather than by substituting "the" for "a" farm.

[21] In the result, the first and third Appellants in the ***Salimba*** Appeal are successful on this aspect of the case.

[22] It must still be decided, finally, whether these two Appellants were "farmworkers" as defined in the Act and, therefore, disqualified from being "labour tenants".

The definition of "labour tenant" in the Act (see paragraph [2] hereinbefore) makes it clear that a farmworker cannot be a labour tenant at the same time. A "farmworker" is defined as a person employed on a farm who in terms of his contract of employment is paid in cash or in some other form of remuneration and not predominantly in the right to occupy and use land, and who is obliged to perform his or her services personally (see paragraph [2] hereinbefore).

On behalf of the Respondent in the ***Salimba*** Appeal it was argued, on the facts, that the first and third Appellants were farmworkers; the Appellants denied that they fell within the terms of the definition.

Two questions arose : firstly, what stage and what duration in a person's occupancy of land must be considered to determine whether he is a

"farmworker" or a "labour tenant"? And, secondly who bears the *onus* of proving whether the status in question is that of farmworker or labour tenant?

[23] As regards the relevant time or period that must determine whether a tenant

is a labour tenant as defined in the Act, and thus not a farmworker, several options were debated in this Court. (It should be noted that the amendments to sections 2 (5) and (6) of the Act in 1997 are not applicable to the present appeals.)

On behalf of the Appellants it was initially argued that the relevant time is the moment when the juristic act of eviction is initiated by the owner of the land. It is at this moment that one has to establish whether the Appellants are or are not protected by the Act. It was submitted by the Appellants that the definition of a "farmworker" is phrased in the present tense, and that the legislature's intention was that the question whether a person is a farm worker must be investigated with regard to his status at the time when the matter comes before Court as a result of an attempted eviction. The LCC (so it was argued) correctly held the following in *Zulu & Others vs Van Rensburg*, *supra*, at page 1258 G :

> It should also be noted that the definition is framed in the present tense (a person who is), unlike certain aspects of the definition of labour tenant. This would seem to suggest that the test must be applied in relation to the factual situation at the time of the events immediately giving rise to the dispute. On this basis, if respondents' contention is correct that there are at

present no agreements regulating the applicants' occupation of the farm, they would also not qualify as farm workers.

30

It was common cause that the Appellants' contracts of employment were terminated during November 1994 (except that of the first Appellant who retired during about 1991), long before the matter came before Court. The Appellants were thus not farmworkers. As regards this aspect, therefore, it was argued on behalf of the Appellants that the use of the present tense in the definition of "farmworker" was significant. Whereas the question of whether a person complies with the requirements of the definition of a"labour tenant" is answered with reference to the history of his residence on a property, the question of whether he is a "farmworker" must be investigated with regard to his status at the time when the matter comes before the court.

[24] To conclude as the Appellants do that the relevant time is the present (i.e. when the present litigation was initiated) can have unexpected, even absurd results.

Consider, for example, the case where a person has for his or her working life provided labour to a landowner, and has enjoyed rights of residence and of cropping and grazing, and yet has been remunerated predominantly in cash. In formal terms he or she would be a "farmworker". Should such a person now retire and, as happens frequently, be allowed by the landowner to remain on the farm with the continuing right to cropping and grazing, and in exchange provide labour in the form of "light" work such as housekeeping, herding, helping with dipping and dosing cattle, supervising younger employees and caretaking, he or she would now formally no longer be a "farmworker". If the definition of

"farmworker" is taken in the present tense only and refers to the moment of the attempted termination of his occupancy, such a tenant as that being described could, if threatened with eviction, conceivably claim the right to remain on the land as a "labour tenant". This would be consistent with paragraph (b), and would seem just and equitable. On the other hand, if one were to extend the definition of "farmworker" into the past (*i.e.* to paragraphs (b) and (c)), the tenant, being then a "farmworker", would not qualify for occupancy as a "labour tenant" and would be subject to eviction. So whimsical a result is patently unjust and could not have been contemplated by the legislature, the more so if the preamble of the Act is kept in mind.

Or, to take another example : The person in question resides on a farm and has the right to use cropping or grazing land on the farm, but is also paid a salary in cash. In good years, his or her rights to use cropping or grazing are more valuable than the salary he or she receives, but in bad years of drought, the converse is true. One can thus say that at some times in the past he or she was a farmworker, if the definition is to be applied to a past state of affairs. To contend that a person who complies with the requirements of paragraphs (a), (b), and (c), but who was in the past intermittently and through no choice of his or hers a "farmworker", is not protected by the Act, is not acceptable.

Or take the case of one who has been a labour tenant for many years. Shortly
before his or her eviction the owner of the land raises the remuneration to such 32
an extent that the tenant is now clearly a farmworker. Is it fair to accept that he or she cannot legally resist eviction?

For these reasons, the present time cannot be the relevant time for establishing whether the occupier was a farmworker or not.

[25] In some cases it was held that the relevant moment is 2 June 1995 (see Meskin J in *Tselentis* at 417 H-J; Hurt J in *Salimba a quo;* Van Dijkhorst J in *Mosehla v Sancor cc* at 621 A-F). In these cases, reliance was placed on section 12 (1) of the Act. Section 12 of the Act, however, deals with the reinstatement of labour tenants who, at that date, would have met the requirements of this Act had it been in force, and who, between that date and 22 March 1996, the date of the commencement of the Act, had vacated the farm or had been for any reason by any process evicted. Read in this context, the provisions of section 12 are not applicable to cases, such as the present, where it is not alleged that the occupiers have, between 2 June 1995 and 22 March 1996, vacated the land or been evicted therefrom. The date 2 June 1995 is, therefore, in the present context inappropriate as a time for establishing whether the present occupiers are labour tenants or farmworkers for purposes of the Act. It obviously could never have been the intention of the Legislature to exclude from the protection of the Act anyone who has, since 2 June 1995, become a labour tenant as defined in the Act.

[26] In my view, the only way to make sense of the confusion reigning in this area is to conclude that the proviso relating to "farmworker" cannot, for the reasons advanced above, refer only to the present time. It must refer to the whole period in respect of which the present occupier, whose occupation is under attack, has been occupying the land in question. The proviso relating to farmworker applies not only to paragraph (a), but also to (b), which also refers to the past.

[27] If one approaches the definition in this holistic or continuous sense, it follows that what has to be established is the predominant quality of occupation over the whole period during which the present occupier has been complying with paragraphs (a) and (b). It may be, as illustrated above, that in respect of some periods, the remuneration paid to the occupier in cash or some other form of remuneration (see paragraph (a) of the definition of farmworker) may have exceeded the value of the right to occupy and use the land; and *vice versa*. What we have to find is the overall sense and value of the occupation. The present time is but one moment in this continuum.

[28] The final question then takes this form : who bears the *onus* to prove or disprove the overall sense and value of the occupation?

Interesting as this question may be, it is not necessary to decide the issue

in this appeal. For, assuming that the *onus* is on the Appellants, they have succeeded on a balance of probabilities in proving that they were not farmworkers at the relevant time.

There is an admitted paucity of evidence relating to the value of the rights to residence, grazing and cultivating the land in question, and to the value of the remuneration paid to the Appellants whether in cash or in *specie*. But what is clear is that the Appellants and their forebears had for many years received the absolute minimum in the form of remuneration for their services. It must be overwhelmingly clear that the value of residence, grazing, cultivation and of having a hearth and home of their own, a place where they could find the fundamental security of living and surviving off the land, must have far outweighed the benefits they received as remuneration in cash or in kind.

[29] There is a further basis on the evidence for finding that the Appellants were not farm workers.

During the cross-examination of Craig Stone, the sole member of Salimba, counsel for the Appellants asked him whether it was the practise throughout the area that people who live on farms must work there. He agreed and explained that if the tenant could not perform the work himself,

> ... there must be either a son or if all the sons are living on the farm than they must come and work there or all the daughters are living on a farm they must come and work there.

It is clear from this evidence that the appellants were not obliged to perform their services personally. It follows that the contract between Salimba and the Appellants did not contain a provision such as is referred to in paragraph (b) of the definition of “farmworker” with the result that the Appellants were not farmworkers as defined.

[30] In the result, I find that the first and third Appellants in the Salimba appeal

have proved that they were "labour tenants" and are entitled to the protection of the Act.

[31] The following orders are made :

A In the appeal of *Zwelake Ngcobo and Others v Salimba cc* (case no 50/98) :

(i) The appeal of the second and fourth Appellants is dismissed with costs.

(ii) The appeal of the first and third Appellants succeeds with costs including the costs attendant upon the employment of two counsel and in their case the judgment of the court *a quo* is set aside and replaced by the following order : "Plaintiff's claim is dismissed with costs".

B In the appeal of *Fikile Ngcobo v Van Rensburg* (case no 631/97) the following order is made :

The appeal is dismissed with costs.

P.J.J. OLIVIER JA

CONCURRING :
MAHOMED CJ
GROSSKOPF JA
FARLAM AJA
MADLANGA AJA